

The Polish Judicial Council v The Bulgarian Judicial Council: Can You Spot the Difference?

Radosveta Vassileva

2018-09-22T12:10:06

On 17 September 2018, in Bucharest, the General Assembly of the European Network of Councils for the Judiciary (ENCJ) voted to [suspend](#) the membership of the Polish National Judicial Council (KRS) due to growing fears of lack of judicial independence in Poland. It was [reported](#) that 100 representatives voted for suspension, 6 were against (the Polish delegation), and 9 abstained. The Bulgarian delegation was among the abstainees, so Western commentators may wonder what the motivation for this position was.

Examining the sequence of events, which led to the peculiar vote of the Bulgarian Supreme Judicial Council (SJC), tells much more about the deplorable state of the rule of law and the lack of judicial independence in Bulgaria than in Poland. Bulgaria's SJC is an independent body, which is responsible for the appointment and promotion of all magistrates (investigators, prosecutors, and judges) in Bulgaria as well as for monitoring their ethical values. Sadly, this institution traditionally complies with the whims of the executive, which has huge implications for Bulgaria's justice system.

SJC's sitting of 13 September: where is the separation of powers?

The verbatim report of SJC's [sitting on 13 September 2018](#) at which the suspension of the Polish KRS was discussed illustrates the long-standing problems of this institution. The sitting was presided by Boyan Magdalincev who serves as Representative of the SJC, a key role in this institution defined in the [Regulation](#) on its administration. When the discussion on Poland was opened, Magdalincev informed the SJC that he had asked both the Ministry of Foreign Affairs as well as the Ministry of Justice about their position on this question, which is striking considering that Article 117(2) of Bulgaria's Constitution explicitly says that judicial authorities are independent of the executive and that judges, jurors, prosecutors, and investigators are bound only by the law. It is also unclear on what legal grounds such advice was sought.

What is more shocking for a Western observer is that these institutions gave concrete instructions in writing. Magdalincev reported that the Ministry of Foreign Affairs underlined that if the SJC voted for KRS's suspension, they could jeopardize Bulgarian-Polish relations, which was not advisable. In addition, Bulgaria counted on the Polish vote for the termination of the Cooperation and Verification Mechanism,

so the SCJ had to keep this in mind, too. The Ministry of Justice, in turn, emphasized that the application of Article 7(1) was an ‘extreme measure, which had to be applied in extraordinary circumstances.’ It ‘advised’ the SJC to consider this for the vote on KRS’s suspension because this was a political question.

When the floor was opened for discussion, few members made contributions. Some members expressed views that the SJC had to vote for KRS’s suspension. However, other members resisted. Ognyan Damyanov declared that ‘there [was] no striking violation of the independence of the judiciary in Poland.’ Veronika Imova said it was incredibly difficult to take this decision because Poland was among the founders of the ENCJ and the KRS was an active member.

The SJC then voted for their common position on KRS: 5 members voted for suspension of KRS’s membership, 1 opposed, and 13 abstained. As a result, they gave a mandate to two representatives to present the Bulgarian position and to vote ‘abstain’ at the ENCJ sitting in Bucharest. It is interesting that 6 SJC members were absent from the sitting at which such an important question was discussed, too.

How did we get here?

Unlike the Polish judiciary who are currently under attack, Bulgaria’s justice system was captured by the executive a long time ago. The sitting of 13 September, referred to above, amply demonstrates that certain practices of the SJC are incompatible with EU values.

The SJC has 25 members: 11 of them are elected by the Bulgarian Parliament; 6 judges, 4 prosecutors, and 1 investigator are elected by the magistrates; the President of the Supreme Court of Cassation, the President of the Supreme Administrative Court, and the General Prosecutor become members automatically. Following a reform in 2015, the SJC is now divided into two colleges: the prosecutorial college (11 members) and the judicial college (14 members).

The so-called ‘political’ quota needs to have the ‘government-likability’ factor to be elected, so unsurprisingly these members are concerned about the government’s opinion formally and informally. The Representative of the SJC, mentioned above, had allegedly been implicated into a number of [scandals](#) concerning non-random distribution of case files and manipulation of judicial panels, but this did not prevent the Parliament from electing him for the political quota.

In addition, Bulgaria’s Prosecutor’s Office has an entirely vertical, ‘Soviet’ structure where all decisions depend on the General Prosecutor who has excessive powers and an untouchable status under the Constitution. He is traditionally faithful to the government. The structure of the Prosecutor’s Office has been criticized by the Venice Commission and by ECtHR case law – see, for instance, [Kolevi v Bulgaria](#). The prosecutors and the investigators who are part of the SJC are direct subordinates to the General Prosecutor. His influence spills over the ‘political’ members of the prosecutorial college, too. The election of the Deputy General Prosecutor Ivan Geshev, nominated by the General Prosecutor himself, in July 2018

is particularly revealing: none of the members of the prosecutorial college asked any questions and the vote was unanimous. With regard to Poland and the KRS, the current General Prosecutor Sotir Tsatsarov was vocal and crystal clear at a [sitting](#) in July 2018: ‘Every State has the right to implement laws, which it deems appropriate (...). The situation in Poland is a question for the Polish Parliament and the Polish justice system (...). Infringing in the work of a sovereign country, which by the way defends its sovereignty in a praiseworthy way (...) is beyond the competence of the SJC.’

It may be shocking for Western commentators to learn that prior to the reform, which divided the SJC into two colleges, all members voted on all questions of appointment and promotion, which meant that prosecutors voted for the appointment and promotion of judges. In communist times, the Prosecutor’s Office was the voice of the regime and was considered more important than the court. This hierarchy, which is not compatible with democratic values, has remained in spirit. Prior to the reform, many judges were promoted because they were faithful to the prosecution. In turn, others suffered disciplinary action when they did not comply with prosecutorial caprices. While the reform constitutes a change for the better, it is extremely difficult to alter the mindset. In a prior [article](#), I raised concern that even the President of the Supreme Court of Cassation is abused because he does not follow orders by the executive and the prosecution.

Where now?

Ultimately, Bulgaria’s government is afraid that Bulgaria may be the next [rule of law crisis](#), so it seeks to build strong relationships with other countries threatened under Article 7 of the Treaty on European Union. The vote on Article 7(1) and Hungary at the European Parliament serves as evidence for this trend – the MEPs from Bulgaria’s ruling party GERB supported Orbán.

Meanwhile, what happens in the Bulgarian SJC and the Bulgarian justice system as a whole can provide an illustration of what may occur in Poland in the future. The Bulgarian case is worse because the country is subjected to the Cooperation and Verification Mechanism, which monitors judicial independence as well as the fight against corruption and organized crime. Since I have read all reports on Bulgaria, I regret to observe that they are sugar-coated and seem to omit disturbing information. Bulgaria is permanently torn by scandals regarding non-random distribution of case files, abuses of judges and prosecutors who resist political orders, purposeful destruction of evidence by authorities etc., but these are not included in the reports under the Cooperation and Verification Mechanism. As a scholar and as an EU citizen, I am starting to doubt not only if EU institutions have the will, but also the capacity to identify threats to the rule of law.

